A LEGAL INQUIRY INTO THE IMMUNITY OF THE PRESIDENT AND HIS MEN FROM SUIT

MARLOWE P. CONCEPCION*

1. *"The King Can Do No Wrong"—A Medieval Concept Revisited*

"O! It is excellent
To have a giant's strength; but it is tyrannous
To use it like a giant. . . ."
William Shakespeare, *Measure for Measure*, Act II, Scene 2.

A lowly vassal like Mallory knew little, but of the little he knew one thing he was sure of was that William, his petty lord, overstepped his powers in kowtowing to the King in having his shanty eclipsed physically by the marketplace. At least that was his gut feeling. So when the local judge finally declared William immune and his petition vexatious, Mallory meekly had his lifestyle cut to fit this rather fashionable idea: William, as the King above him, can do no wrong. Without a remedy in sight, Mallory nailed his planks anew, elsewhere, while his talkative wife berated the unpopular decision.

The immunity of kings or the doctrine of sovereign immunity[1] had obscure beginnings, but legal historians at least agree that it shared the same roots as the divine right theory and that the nuances of the doctrine were buried deep in the antiquities of feudal English law.[2] During the medieval period, England was divided into small landholdings ruled by petty lords whose word was law in his domain and this held sway over all his vassals. Much too often, the petty lord had to settle disputes between his vassals, and so courts became a necessary fixture of medieval life. The courts, however, were not created independently of the petty lord but were

* LL.B., University of the Philippines College of Law, 1985.

1 At common law, sovereign immunity was a principle which "recognized that it was necessarily a contradiction of the sovereignty of any lord and especially of the king to allow him to be sued as of right in his own courts." Cunningham, *Nixon v. Fitzgerald: A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 IA. L. REV. 562 (1983) *quoting from* 4 RESTATEMENT (SECOND) OF TORTS §895 introductory note, at 393-94.

2 *See* Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972-73); Stein, *Nixon v. Fitzgerald: Presidential Immunity As a Constitutional Imperative*, 32 CATHOLIC U. L. REV. 759 (1983); Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 307-312 (1959); Kennedy, *An Examination of Immunity for Federal Executive Officials*, 28 VILL. L. REV. 956, 963 (1982-83). The immunity of executive officials, on the other hand, is based more on pragmatic consideration than on historical account or constitutional mandate. In addition, rather than being formed of its own rationale, executive immunity, to a large extent, is derivative of judicial immunity. Comment, *Economou v. U.S. Department of Agriculture: Blurring the Distinctions Between Constitutional and Common Law Tort Immunity*, 18 W. & M. L. REV. 628 (1977).

actually created through his initiative and, presumably, manned by his best and brightest. The vassals were subject to this court, but certainly it cannot coerce the petty lord, unless he voluntarily submitted to the judgment of its counsellors. The petty lord, however, was instantly subject to coercive suit instituted in the court of his over-lord, one step up the feudal hierarchy, and that lord in turn is subject to the king's court.[3] Needless to say, the king stood at the apex of this feudal pyramid, and being the supreme law-giver of the kingdom, he cannot be coerced by any lord's court and definitely not by his own. In this feudal scheme, immunity of the king (or immunity of the lord) was simply defined as immunity against unconsented suits in the king's (or lord's) court.[4] By extrapolation, if there should be any court in that feudal order superior to the king's, then undoubtedly the king would be subject to coercive suit there. So it follows that the lord is subject to the king's court, but the king, by historical accident, was answerable to no court, save perhaps a deity to foster his "divine" connection.

With respect to any lord lower than the king, it cannot be said that the lord's immunity carried with it the incantation that he was incapable of wrong. He may be held answerable in the king's court, but insofar as his own court is concerned, he is non-suable and his vassals had no remedy against him there.[5] Without any court superior to the king's, no medieval Englishman had remedy against him, and in that sense *could* the king be considered as incapable of wrong?

The allegory above as well as current arguments in the Philippine political scene regarding presidential immunity could easily mislead one to believe that the maxim "the king can do no wrong" (and the corollary that no one had remedy against him) was the accepted view in medieval England. Nothing could be farther from the truth. Professor E. Engdahl straightens this out when he said that the principal feature of medieval English polity is that it repudiated this maxim that the King was incapable of wrong.[6] Tradition fluorished whereby the king himself was made subject to law even if he was not suable in his court without his consent. The major premise of the Magna Carta, which is a compact time and again issued and re-issued by kings and reinforced by baronial struggles, was that the king was not only capable of but disposed to doing wrong.[7]

In search of an effective legal concept that would render claims against the king remediable, the medieval English lawyer developed a system outside of the regular court processes to redress kingly wrongs and restore the rule of law. Hence, from late in the thirteenth century the practice of presenting the king with *petitions of right* to secure redress for grievances

[3] Engdahl, *supra* note 2, at 2-3.
[4] *Id.* at 3.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*

became the vogue.[8] "Petitions of right" were premised on the idea that the king had indeed done wrong and it gave rise to the corollary that the king could not rightfully refuse to grant a petition of right.[9]

But history, legal history included, has pockets of obscurity where changes were brought about by "conceptual confusion" in response to "the felt necessities of the times" and considerations of convenience. The doctrine of sovereign immunity was not spared from this tendency as historical events perpetuated the maxim "the king can do no wrong" as though this was the premise originally accepted during the medieval age. As a matter of fact, there now seems to be adequate evidence presented by legal scholars that the expression "the king can do no wrong" meant for the medieval man "that the king must not, was not allowed, not entitled to do wrong."[10] Therefore, the vassal's petition was aptly called a 'petition of right' because this was a right which the subject has against the king.

What really induced a retreat from that promising and rather enlightened medieval interpretation to the maxim "the king can do no wrong" was the intervention of absolute monarchies in English history. Lawyers and political thinkers during this period tried to justify the workings of the political structure and successfully, although athwart precedents, they molded a philosophically and jurisprudentially acceptable doctrine of sovereign immunity that addressed more the *experience* of the times than it did the *logic*. The most influential writer of that period was William Blackstone whose *Comentaries on the Laws of England* was published in 1765. Blackstone explained that the rationale of the absolutist monarchs had *accustomed* English lawyers to a different spin to the maxim "the king can do no wrong" than had been accepted in the medieval period. The interpretation became that the king is not only incapable of doing wrong but of thinking wrong. While the seventeenth century political setting saw the constant struggle between the Crown and Parliament, this fiction was maintained[11] (and this may be partly attributed to the awesome powers, political and military, vested in the Crown). But it certainly was not Blackstone's view that the king had *carte blanche*, but that since the king can do no wrong, any misdeed done in his name, as far as the law was concerned, was not done by the King at all. Explained Blackstone:

> The law will not suppose the king to have meant either an unwise or an injurious action, but declare that the king was deceived. . . . For as a king cannot misuse his power, without the advice of *evil counsellors*, and the assistance of *wicked ministers*, these men *may be examined and punished*. The constitution has therefore provided, by means of indict-

[8] *Ibid.*

[9] *Ibid. quoting from* Holdsworth, *The History of Remedies Against the Crown*, 38 L. Q. REV. 141, 149 (1922).

[10] Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 4 (1936).

[11] Engdahl, *supra* note 2, at 4.

> ments, and parliamentary impeachments, that no man shall dare assist the Crown in contradiction of the laws of the land. But it is at the same time a maxim in those laws that the king *himself* can do no wrong. . . .[12] (Emphasis supplied)

"The king can do no wrong" should not be construed in such a way that every transaction by the government is just and lawful. According to Blackstone it carried two important propositions. First, that whenever an act is found to be unfavorable in the course of the administration of public affairs, this act should not be imputed to the king, nor should he be liable for it personally. Second, it means that the prerogative of the Crown does not lean towards the commission of injury but is inclined for the good and benefit of the people and therefore cannot be exercised to their prejudice.[13]

If the medieval era had remedies by way of *petitions of right*, alas, this cannot be asserted in the court of an absolutist monarch in view of the prevailing fiction that the king is incapable of wrong. Hence, there had to be a remedy to go hand in hand with the prevailing political beliefs. Blackstone answered this dilemma by introducing the concept of *petitions of grace* whereby the relief granted was not a matter of right but a matter of grace from a vaguely superior entity. Professor Engdahl was quick to add that the concept was "historically inaccurate"[14] but let it be said here that, though backward by medieval standards, it suited perfectly the immunity concept of the period.

The Philippine immunity concept is also a product of the minds and needs of this generation. It may have well stemmed as a clean offshoot of past precedents presenting a rather neat transition or, as was explained above, it may have run athwart precedents and overturned previously fashionable and accepted concepts. Whatever, it still is a response to "the felt necessities of the times" and considerations of political convenience.[15] There are those who would immediately comment that the medieval-alluding fable above is more a current Filipino theme and a possible future conflict considering the present amendments to the 1973 Constitution.[16] Strictly, if we have to take a medieval premise, there certainly are elements in the tale which are anachronous—and deliberately so—Mallory not having invoked the petition of right against the king and the possibility of William being tried

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[12] *Ibid. quoting from* 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 7, at 237.

[13] *Ibid. quoting from* BLACKSTONE'S COMMENTARIES, 238-39.

[14] *Id.* at 5.

[15] *Id.* at 1.

[16] Introductory note of the COMELEC Primer reads: We are holding a plebiscite to ratify or reject proposed amendments to the Constitution, adopted by the Interim Batasang Pambansa, sitting as a Constituent Assembly. Under the Constitution, any amendment to, or revision of, the Constitution shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not later than three months after the approval of such amendment or revision. Batas Pambansa Bilang 122 fixed April 7, 1981 as the date of the plebiscite when the proposed amendments shall be submitted to the electorate for their consideration.

before the king's court not explored. (It just goes to show how easily writers and historians are lured into paths of least resistance.) The tale, however, if imprecise was rather apt in its simplification of elemental concepts that have presently taken on a sophistication and gloss in all the years we have been shaping our constitutional values. Either we, as purists, are fixated on the medieval credo which, incidentally, laid down the very foundation of the concept of a government under law or, despite having aged historically, we *retreated* conceptually by necessity or convenience and fell for Blackstone's absolutist interpretation which left the king unruffled but damned his "evil counsellors" and "wicked ministers"—or we went a way entirely our own, untrodden hitherto, wherein no one properly connected in the official hierarchy may be accountable for wrongs done while in office.

This paper tries to examine the current immunity concept embodied in the amended Constitution, specifically in Article VII section 15 and other related constitutional provisions. It will address the current arguments on the immunity issue, both pro and con, and it will examine the alternatives that would have been available. Since one can hardly fence-sit on this issue without incurring a stripe on one's pants, as the *fence* had just been erected and painted as well (the amendment on presidential immunity was ratified April 1981), the bias of the writer may show. Pride still swells with the preservation of good constitutional values.

2. *The Ratification and Post-Ratification Conflict*

Last April 7, 1981, a nationwide plebiscite was held[17] and a majority of the voters ratified an amendment to the 1973 Constitution which, at present, is the subject of intense scrutiny and, insofar as the opposition camp is concerned, an obvious item for repeal. The heat and sparks spewed out from this amendment, now contained in Article VII section 15 of the Constitution, is rivalled only if not bettered by battle-weary Amendment No. 6. Under the heading *The President*, Article VII section 15 reads as follows:

> The President shall be immune from suit *during his tenure. Thereafter*, no suit *whatsoever* shall lie for official acts done by him or by *others* pursuant to his specific orders during his tenure.
>
> The immunities herein provided shall apply to the incumbent President referred to in Article XVII of this Constitution. (emphasis supplied)

[17] As presented under Batas Pambansa Blg. 122, the following is question No. 1: "Do you vote for the approval of an amendment to the Constitution and to Amendment No. 2, as proposed by the Batasang Pambansa in Resolution No. 2, which, in substance, calls for the establishment of a modied parliamentary system, amending for this purpose Articles VII, VIII, and IX of the Constitution, with the following features:

x x x

"x x x The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure. This immunity shall apply to the incumbent President referred to in Article XVII of this Constitution."

Very appropriately, but very briefly, the COMELEC Primer on the 1981 Amendments presented the key arguments for both sides on this issue of immunity. For a "yes" vote, the argument was presented thus: "The immunity from suit of the President and those who performed acts pursuant to his orders will ensure continuing national unity. There will be no vindictiveness against the outgoing President. Only acts performed by subordinates pursuant to legal orders will be covered. Abuses are not included."[18]

The argument for a "no" vote was presented in this manner:

> Immunity to the President and to other officers during and after their tenure violates accountability of public officers which provides that public office is a public trust and that public officers shall remain accountable to the people. Immunity is license to abuse, without criminal or civil liability, for acts performed without or in excess of authority, public officers who are public servants become masters of the people.[19]

These "seed" arguments three years ago are today's rallying points for those who defend or attack the disputed constitutional provision. Opposition members of parliament (MPs, hereinafter) of the recently assembled Batasang Pambansa attempted repeated sorties against this provision seeking its repeal.[20] In its Resolution No. 44, the fifty-nine members of the coalesced minority deplored that under the constitutional provision, the President and his entire administration are effectively insulated from suits for any misdeed.[21] MP Alberto G. Romulo, the principal author of the resolution, said that post-tenure immunity granted to the President and the extension of the immunity to his subordinates violate the constitutional principle that a public office is a public trust and that public officials shall remain accountable to the people.[22] The coalesced opposition believed that this provision makes a mockery of the basic principle that no one is above the law. However, the opposition concedes that the first sentence of the provision granting the President immunity *during his tenure* is defensible and should stay.[23]

Justice Minister Estelito P. Mendoza, taking up the cudgels for the Government, reacted to the opposition's resolution and issued the following comment:

> The idea behind the presidential immunity from suit is to allow the President to act freely, unimpeded by any thoughts of being prosecuted during and after the end of his term. If the Constitution would allow the

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[18] This argument was submitted by Leonardo B. Perez, then Presidential Adviser on Political Affairs.

[19] This argument was submitted by Ex-Sen. Ambrosio B. Padilla, then counsel to UNIDO.

[20] Bulletin Today, Aug. 16, 1984, p. 1; Bulletin Today, Dec. 18, 1984, p. 7, col. 1-6.

[21] Bulletin Today, Aug. 16, 1984, p. 1.

[22] *Ibid.*

[23] *Ibid*

> President to be sued, it would in effect mean suing the people. The President is the only nationally elected official charged with the responsibility of looking after the country's welfare.[24]

More recently, MP Alberto Romulo reeled out in detail why Article VII section 15 should be repealed.[25] His three-part article was interspersed with references to constitutional provisions of countries the world over which followed a philosophy on immunity at variance with our own. The crucial points conveyed by the article are: 1) re post-tenure immunity—the grant of post-tenure immunity to the President is a radical departure from accepted constitutional norms in most countries of the world. Said the MP: "This grant of after-incumbency immunity has no parallel in other constitutional governments. This retrogression to the absolutist concept of 'the king does no wrong' is an anachronism in a country which prides itself to be called democratic."[26] 2) re extension of immunity to subordinates—the extension of immunity to subordinates has no parallel even in monarchical systems like Norway, Belgium and Spain whose constitutions limit the dictum "the king does no wrong" to the king himself and hold the ministers and subalterns responsible for whatever wrong or damage done by the king himself.[27]

Again, Minister Estelito Mendoza, taking the government line, had the following reactions:

> There would be instances when the life of the nation would depend on the decision of the President and such decision must have to be taken immediately without the benefit of a long period of study and reflection. Immunity is given to the President as a policy judgment of the people. By the nature of our government, we have reposed on the President the awesome responsibility of assuring the safety, survival, and progress of the country. We do not want a leader who, before taking action, would hesitate thinking that when he makes the decision, he stands the risk of being liable penalty or civilly after he shall have held office.[28]

In a nutshell, therefore, this is what this controversy boils down to: The "yes" camp wanted to preserve the powers of the President to the extreme of protecting the Chief Executive's alter egos and other subordinates who execute "official acts" pursuant to the President's orders during his tenure. In all likelihood, this camp would lean on the strength of the 1981 ratification, our unique constitutional experience, our people's heavy reliance on the President, and the presumed perpetuity of good intentions of present and future presidents to justify the retention of Article VII section 15. On the other hand, the "no" camp would want to reemphasize the principle that no man or public officer is above the law

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[24] *Ibid.*

[25] Bulletin Today, Dec. 18, 1984, p. 7, col. 1-6; Dec. 21, 1984, p. 1, col. 1-5; and Dec. 22, 1984, p. 7, col. 1.

[26] Bulletin Today, Dec. 18, 1984, p. 7, col. 1.

[27] *Ibid.*

[28] Bulletin Today, Dec. 19, 1984, p. 8, col. 3-4.

and that public officers, ultimately, are accountable to the sovereign people.[29] While conceding that presidential immunity is a must for swift and effective executive action, this privilege must pertain to the President *only* and must be co-terminous with his term of office. This camp would not accede to the sweeping extension of this absolute privilege to "others" for this would render nugatory, for any aggrieved Filipino citizen, the due process clause[30] and the right for redress of grievances[31] etched in the Bill of Rights of the Constitution.

3. *Article VII Section 15—An Initial Assessment*

Article VII section 15 is a delicately worded provision. Upon close examination, it may not apppear altogether "tight" and the ensuing free play for other interpretations is a cauldron for mischief. The sentence is a plain re-statement of a principle also enunciated in the unamended version of the 1973 Constitution or, more precisely, in Article VII section 7 therein, which provides: "The President shall be immune from suit during his tenure." It may be well worth noticing that nowhere in the 1935 Constitution is there a provision similar to the above or vaguely approximating it in effect. The Federal Constitution of the United States could not have possibly been the source of inspiration (although our 1935 Constitution drew much from it) since the U.S. Constitution did not provide for the Chief Executive's privilege of immunity from suit.[32] Hence, the policy adopted in the first sentence of Article VII section 15 could only be considered as a departure making clear an evolved or still evolving "policy judgment" of the Filipino people, born of "logic" or "experience" according to Holmesian formulation.[33] In a way, this policy was well-accepted because it merely seeks to strengthen the *office* of the President so that whosoever sits there and wields the power could act decisively when so compelled by events without fear of being hindered and delayed by suits. But the noteworthy phrase in the first sentence is "during his tenure." As a whole, the sentence meant that the President exposes himself to suits like any common Filipino citizen

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[29] *See* CONST. art. II, sec. 1; art. XIII, sec. 1.

[30] *See* CONST. art. IV, sec. 1.

[31] *See* CONST. art. IV, sec. 9.

[32] The Constitution of the United States contains no express provision dealing with the immunity of the President of the United States from civil damage liability. But Article II, sec. 4 of the U.S. Constitution provides that the President may be removed from office by impeachment for certain crimes and misdemeanors. Bullard, *Absolute Presidential Immunity from Civil Liability: Nixon v. Fitzgerald*, 24 B. C. IND. & COM. L. REV. 737 (May 1983). But in *Nixon v. Fitzgerald*, the U.S. Supreme Court held that the President is entitled to absolute immunity from civil damage liability upon implied causes of action for violation of individual rights resulting from official acts. The *Nixon* Court reasoned that the immunity granted was "functionally mandated" by the President's unique constitutional status and the separation of powers and was supported by history and public policy. *Id.* at 741.

[33] Justice Holmes' famous observation: "The life of the law has not been logic: it has been experience." O. HOLMES, THE COMMON LAW 1 (1881).

after his term (should he complete it). Obviously, the policy enunciated here is in consonance with other constitutional norms, namely, that a public office is a public trust and a public officer shall remain accountable to the people.[34]

A wave of amendments came in 1976, the another in 1981, which saw the immunity provision in the form we see and read today. The first sentence was untouched; but the second sentence became the flammable which fueled the present debates. The second sentence reads:

> Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.

This sentence defines the very contours of the present controversy. It made two things possible: 1) the grant of post-term immunity to the President; 2) it extended the immunity to others who performed official acts pursuant to the President's orders during his tenure. Suddenly, the office of the President felt vulnerable with the armor afforded by the first sentence; now, the office-holder and power-wielder must be protected also after his tenure. Consequently, "thereafter"[35] here means nothing short of forever. The result: absolute immunity from all suits "whatsoever"[36]—civil or criminal. But the immunity holds only for official acts done by him, and, insofar as his subordinates are concerned, only in respect to orders of the President during his tenure. So has the immunity extended to what may loosely be interpreted as the entire staff and administration of the Chief Executive.

Coming close on the heels of the 1976 amendments and straining the standards that constitutions are generally made to withstand[37]—the test of time—the second sentence seems more an after-thought of the first, expressing an inadequacy which was not immediately perceived during the first eight years of the 1973 Constitution. Wary of the wide acceptability of the first sentence, the afterthought dared not disturb it with its rather radical elements. It modestly sequestered itself as a lingering second statement expanding the effect of the first, after being ratified by the Filipino people, unguided here by any constitutional or historical precedent.

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[34] CONST. art. XIII, sec. 1.

[35] *Thereafter* was defined "after that", "from then on"; *whatsoever* as "whatever" or "of any kind so ever." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1981).

[36] The combination of the words "thereafter" and "whatsoever" leads inevitably to the conclusion that the immunity granted is no less than absolute and it proceeds even after the President's tenure.

[37] "A constitution is classified as rigid when it may not be amended except through a special process distinct from and more involved than the method of changing ordinary laws. . . . A constitution is classified as flexible when it may be changed in the same manner and through the same body that enacts ordinary legislation. The Constitution of the Philippines and that of the United States are rigid." SINCO, PHILIPPINE POLITICAL LAW 69 (1962).

The use of the word "others" in the second sentence affords a free play construction and is therefore a possible source of confusion. Not preceded by a train of antecedents, the rule of *ejusdem generis*[38] cannot be applied with useful effect. It may not be too far out to imagine a situation where an officer of the government, quite low in the official hierachy but noticeably within the Executive chain of command, invoking Article VII section 15 making him derivatively and therefore absolutely immune from all suits as the President is. The question redounds to how long or how short should the chain be cut. Some journalists and other writers seem to have no trouble in construing "others" in this constitutional context. MP Alberto Romulo and one journalist[39] would include under this category the members of the First Family, the members of the Cabinet and the military. But even with these broad categorizations, do we go down as far below as the sergeant (or a third-degree relative), or would we rather limit the scope to a one-star general (or the children of the First Couple)? A good example that would provc this point is the case of secret marshals.[40]

Secret marshals were authorized to shoot down holdupmen operating in jeepneys and buses if they ignore orders to surrender.[41] These lawmen (if we may call them that at all) were activated (August 1982) and then re-activated (June 1984) under the commander-in-chief powers of the President.[42] The ends they serve were patently meritorious: they are a potent boost to the campaign against crime in the metropolis, they protect helpless students along the university belt, and certainly they give the criminal elements something to worry about. It was reported that between August 1982 and December 1982 these marshals shot down more than thirty-two criminals, and it was further reported, as a consequence, that the holdup of public transport dropped dramatically.[43] The marshals were

[38] "Where general words follow the designation of particular things, or classes of persons or subjects, the general words will usually be construed to include only those persons or things of the same class or general nature as those specifically enumerated. This rule is founded upon the idea that if the legislature intended the general words to be used in an unrestricted sense, the particular classes would not have been mentioned. General terms commonly used in statutes are: 'and others', 'and the like', 'and similar things'." ALCANTARA, STATUTES 32 (1979).

[39] Vicente Foz in Bulletin Today, Aug. 16, 1984 has in his list the following: members of the First Family, the Cabinet, and the military. MP Romulo in Bulletin Today, Dec. 22, 1984 *supra* note 25, has the same list.

[40] The secret marshals were finally deactivated by Gen. Prospero Olivas, Bulletin Today, July 28, 1984, p. 1. Since this task force was created by presidential order, it stands to reason that so shall they be dismantled. After all, Gen. Olivas' orders come from above his head.

[41] Bulletin Today, June 19, 1984, p. 1.

[42] "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or supress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." CONST., art. VII, sec. 9.

[43] Bulletin Today, June 19, p. 1.

created by a presidential order last August 1982 and are attached to the Philippine Constabulary and the Metrocom. Numbering some one thousand men, they were drawn from the ranks of military trainees, soldiers, police forces as well as from the Presidential Guard Battalion.[44]

Several civil liberty groups[45] raised the hue and cry over this secret marshal deployment contending that special police let loose in this manner can easily violate the constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law.[46] Now, if suits are filed against a secret marshal for the infringement of a constitutional right, can the marshal invoke as a defense Article VII section 15 together with the authority granted him by presidential order? Is an aggrieved property owner left without a remedy (remember Mallory) in the face of an encounter with a secret marshal in reckless pursuit of his prey? What if an innocent bystander was shot accidentally by secret marshals in pursuit of the criminal, will the immunity cover this case too? It seems that the hazard of extending this constiutional "halo" is precisely the possibility of its sweeping extension, and the catch-all word "others" paves a fast route towards further confusion.

It seems plausible that Article VII section 15 has weaved a legend of legal invincibility ensuring the President and his entire administration complete insulation from suits for any misdeed. The crucial issue of accountability arises. Luckily, the present Constitution is nowhere near mute insofar as accountability of public officers is concerned. It provides that public office is a public trust and that public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty and efficiency and shall remain accountable to the people.[47] The President, the members of the Supreme Court, and the members of the constitutional commissions shall be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, bribery, other high crimes, or graft and corruption.[48] Then there is the provision creating the Tanodbayan (Ombudsman) which shall receive and investigate complaints relative to public office.[49] Another related provision creates the special court called the Sandiganbayan which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses

[44] Bulletin Today, July 28, 1984, p. 1; June 19, 1984, p. 1, 10.

[45] The most vocal if not the most distinguished is the Integrated Bar of the Philippines Commission on Human Rights and Due Process chaired by retired Justice J.B.L. Reyes, who together with IBP President, Raul Roco, expressed "grave alarm" over the reactivation of secret marshals licensed to shoot down suspected holdupmen and robbers.

[46] Article IV, section 1 of the Constitution provides "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

[47] CONST. art. XIII, sec. 1.

[48] CONST. art. XIII, sec. 2.

[49] CONST. art. XIII, sec. 6.

committed by public officers.[50] A very important provision[51] sticks out prominently and engages Article VII section 15 in a collision course. This constitutional provision states that judgments in cases of impeachment shall be limited to removal from office and disqualification to hold any office of honor, trust or profit under the Republic, but the party convicted shall *nevertheless be liable and subject to prosecution, trial and punishment in accordance with law.* Would not this series of constitutional provisions run against the policy laid down in Article VII section 15 especially insofar as the immunity extended the *cordon sanitaire* to undefinable "others"?

On the whole the scenarios above use the Constitution as a basic tool for bringing forth a cause of action, mainly on the strength of provisions under the bill of rights. Concerning rights and their remedies, in the United States at least, the Federal Constitution of late had been used offensively as a *sword* to vindicate government intrusions on individual rights and properties, whereas previous cases had relied on it merely as a defense or as a *shield* to ward off actions undertaken by the government.[52] In a 1971 decision,[53] the U.S. Supreme Court held that a constitutional right may become an ingredient of an affirmative cause of action *notwithstanding* the absence of a law creating such cause of action. The judiciary is here nudged into an activist's role of quite disturbing dimensions. The rationale offered is that once a substantive legal norm has been declared to be in the constitution, there is an implied judicial prerogative to *fashion remedies* that give "flesh to the word and fulfillment to the promise those norms embody."[54] This may be justified when a lawmaking body had not acted upon ways in enforcing constitutional rights so that the rights in question may be so wanting of remedies as to render them a "mere form of words." In the United States, the courts may entertain the idea of enforcing remedies directly from the U.S. Constitution because it provides that "the judicial power shall extend to all cases ... arising under this Constitution[55]" such that should a case be brought directly upon, say, the Fourth Amendment seeking to vindicate substantive rights guaranteed by that provision, the court's authority to create a remedy may be inferred in the phrase "judicial power" since it is that power which extends to all cases arising under the American constitution.[56]

While there is a constitutional provision in our constitution that parallels such provision in the U.S. Constitution[57] giving our courts a

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[50] CONST. art. XIII, sec. 5.

[51] CONST. art. XIII, sec. 4.

[52] *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972).

[53] *Bivens v. Six Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

[54] Dellinger, *supra* note 52, at 1534.

[55] U.S. CONST. art. III, § 2.

[56] Dellinger, *supra* note 52 at 1542.

[57] Article X, section 1 of the Constitution provides: "The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established

measure of remedial innovativeness, the Filipino's guaranteed rights under the Constitution are in fact translated into law and is protected from the incursions of unscrupulous public officers. The New Civil Code[58] provides that any person suffering material or moral loss because a public servant or employee refuses or neglects without just cause to perform his duty may file an action for damages and other relief against the latter.[59] Moreover, the same law provides that any public officer who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the constitutional rights and liberties of another person shall be *liable* to the latter for damages.[60] In these two provisions at least our lawmakers had given "flesh to the word" and "fulfillment to the promise" of our bill of rights by guaranteeing relief to any citizen for infringement of these rights and liberties suffered from *any* public officer. This again cannot be squared with the policy laid down in Article VII section 15 which immunizes what may liberally be construed as an "entire administration."

Perhaps it is here that it is advantageous to go back and reflect on the structural qualities of a good constitution. On the basis of structure, a well-written constitution should be brief in form, *clear in expression,* and comprehensive in scope.[61] As ably expressed by one constitutional authority: "Clearness in the fundamental law is conducive to a correct and proper understanding of its provisions. But it is more than that. It is also evidence of the integrity of purpose on the part of the framers who should have no base motives to be concealed by intentional vagueness."[62] Perhaps, too, it is ripe to examine the constitutions of other countries, as MP Alberto Romulo did, so we may gain a clearer perspective of our own.

4. *Constitutional Comparisons*

MP Alberto Romulo's article[63] showed how the present Philippine Constitution had bettered all other constitutions world-wide in two distinct aspects: the granting of post-term immunity to the president and the effective diffusion of this immunity to his subordinates. Constitutional comparisons[64] show common norms by which peoples around the world protect themselves from the powers of government wielded by their leaders during their terms of office.

Some constitutions (Argentina, Colombia, Paraguay) offer implied immunity from suit in that the acts of the presidents of these countries are

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by law." Then Article X, section 5 provides the cases where this judicial power may be validly exercised.

58 Rep. Act No. 386 (1950).

59 CIVIL CODE, art. 27.

60 CIVIL CODE, art. 32.

61 Sinco, *supra* note 37, at 70.

62 *Ibid.*

63 Actually , a three-part legal exposition featured in Bulletin Today, Dec. 18, 21 and 22, 1984, p. 7.

64 *See* BLAUSTEIN & FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1970).

effectively "sanitized" by their ministers and other subordinates. The constitution of Argentina provides:

> Art. 87. Eight ministers, secretaries of state, shall have in their charge the handling of the business of the Nation and shall *legalize* the acts of the President with their signatures which requirement is necessary if they are to be valid. . . . (emphasis supplied)
> Art. 88. Each minister is responsible for the acts he legalizes, and he is jointly responsible for those in which he concurs with his colleagues.

The constitution of Paraguay (Argentina's next-door neighbor) states

> Art. 184. The business of the Republic shall be conducted by ministers of the executive power, who shall *authenticate* the acts of the President. . . .
> Art. 186. Each minister is individually responsible for the acts he *legalizes*, and is jointly responsible for those to which he agrees with his colleagues. The ministers shall present an annual report on their actions to the President of the Republic. (Emphasis supplied)

The constitution of Colombia provides that:

> Art. 135. The ministers and chiefs of administrative agencies, as superior chiefs of the administration, and the governors, as agents of the government, may *on their own responsibility*, perform such specific functions belonging to the President of the Republic, as supreme administrative authority, *as may be ordered by the President.* The functions that may be delegated shall be specified by law. This delegation *relieves the President of responsibility*, which shall devolve *exclusively upon the person to whom the functions are delegated*, whose acts or decisions may at all times be amended or revoked by the President, who assumes responsibility therefor. (Art. 35, Legislative Act of 1945) (emphasis supplied)

The "laundry" job done by the ministers of the above countries for their respective Presidents do not find a perfect parallel in the Philippine Constitution. Our fundamental law provides that the Prime Minister and the Cabinet shall be responsible to the Batasang Pambansa for the program of government approved by the President.[65] This does not seem to be a delegation amounting to relief of responsibility in the absence of an express provision, and further, because the Constitution, provides that the President shall have the *control* of the ministries[66] and shall formulate the guidelines of national policy.[67] Moreover, the fact that he is the *approving* power insofar as the program of government is concerned, makes him the visible target of suits and not his ministers who seem relegated to an *overseeing* function under the general control of the President. If the ministers are held "responsible to the Batasang Pambansa," as the constitutional provision states, they seem liable only for acts committed by them in carrying out that program of government, but not for acts of the President which, constitutionally, they have no power to legalize or authenticate unlike the ministers

[65] CONST. art. IX, sec. 2.
[66] CONST. art. VII, sec. 8.
[67] CONST. art. VII, sec. 13.

of Argentina and Paraguay. The President of Argentina and Paraguay (as common constitutional practice), and the President of Colombia (should he exercise his power to delegate functions permitted and specified by law) may use the offices of their ministers to "filter" their acts of legal obstacles that may fuel controversies in the future. The ministers therefore, being presumably experts in their respective fields, are competent insulating shields for the President who now has ample room to pursue bold initiatives and follow through his program of government unfettered by often nasty and inconsequential suits.

The argument of MP Romulo that immunity should be *contemporaneous* with the terms of office or tenure of the President is exemplified by the constitutions of Colombia, Peru, South Korea and Kenya. The constitution of Colombia provides that:

> Art. 131. The President of the Republic, *during the terms of which he was elected,* and the person to whom the executive power may be entrusted, as long as he exercises it, *may not be prosecuted or tried for crimes* except upon impeachment by the House of Representatives and when the Senate shall have declared that there are grounds for the trial. (Art. 31, Legislative Act of 1910). (Emphasis supplied)

The constitution of Peru provides an almost absolute immunity during the tenure when it states that:

> Art. 210. The President of the Republic can only be charged *during his* tenure with treason of the homeland, preventing presidential, parliamentary, regional or local elections, dissolving the Congress except for the provisions of Art. 227, and impeding its meeting or activities or those of the National Elections Board and the Court of Constitutional Guarantees. (Emphasis supplied)

This theme is also followed by the South Korean constitution which provides that:

> Art. 60. The President shall not be charged with criminal offenses during his tenure of office except for insurrection or treason.

Finally, the constitution of Kenya spared no space in order to make its immunity policy as clear as possible when it provides that:

> Art. 14(1) No criminal proceedings whatsoever shall be instituted or continued against the President *while he holds office,* or against any person *while he is exercising the functions of the office of the President.*
>
> (2) No civil proceedingns in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President, *while he holds office,* or against any person *while he is exercising the functions of the office of the President....* (Emphasis supplied)

If previously, the constitutions of Argentina, Colombia and Paraguay indicated an *implied* immunity by reason of the "legalizing" and "authen-

ticating" effects done by their ministers, the constitutions of Italy and Czechoslovakia provide an *express* immunity for the President in actions carried out in the exercise of his office. But the immunity stops with the President. It is not shared with any other official. The Italian constitution provides that:

> Art. 90. The President of the Republic cannot be held responsible for acts carried out in the exercise of his duties, save in cases of high treason or breaches of the Constitution.

The constitution of Czechoslovakia, on the other hand, provides that:

> Art. 65. The President of the Czechoslovak Socialist Republic may not be subjected to judicial prosecution for actions connected with the exercise of his office.

Finally, if the reader thinks that we have progressed much in our political doctrines, this may not be true in respect to the doctrine of sovereign immunity. Blackstone's England is still much with us today in the constitutions of Norway, Belgium and Spain. The Norwegian constitution states that:

> Art. 5. The King's person shall be sacred; he cannot be blamed or accused. The responsibility shall rest with his counsel.

Belgium's constitution provides that:

> Art. 63. The King's person is inviolable; his Ministers are responsible.

The constitution of Spain reads:

> Art. 56(3). The person of the King is inviolable and is not subject to responsibility. . . .
>
> Art. 64..1 The actions of the King shall be countersigned b the President of the Government and, when appropriate, by the competent ministers. . . .
>
> 64.2 The persons who countersigned the acts of the King shall be responsible for them.

These constitutions hark back to the doctrine espoused by Blackstone in seventeenth century England when the fiction fluorished that the misuse of power by the king, in the eyes of the law, was not done by the king at all who was only "deceived" by his ministers. A variant of this theme is found in the constitutions of Argentina, Paraguay and Colombia in that the ministers are deemed responsible individually or jointly when they legalize or authenticate the acts of the President, thus shielding the superior from suits.

True enough, the danger of comparing constitutions and constitutional provisions is that it highlights a concept, trend or norm while suppressing, with disastrous effects, its historical and legal antecedents, and which is under-

standably alien to the constitutional experience and tradition of the Philippines. And herein lies the key to all constitutional diversity. What may be considered worldwide as a commendable norm may be one which this country had outgrown from a historical standpoint and from which it is prepared to depart from or perhaps the norm is something this country cannot grow up on (because that was not the direction it chose or *elected* to grow) and from which, again, it is prepared to differ. Every constitution is *sui generis*. Justice Holmes' famous observation is that "the life of the law has not been logic: it has been experience"[68] and this applies as well to constitutions, and therefore to expect that constitutions follow a norm is to expect as well that countries share the same experiences so as to hold, more or less, the same values. The Filipino people had chosen to depart from accepted norms the way it had. Thus, Justice Minister Estelito Mendoza considered the immunity amendment ratified last April 1981 as a "policy judgment" of the people. With these guidelines, it would seem fairer to criticize the immunity provision from *within*, that is, from the standpoint of the mass of values we had enshrined in the Constitution, and using these values and pitting them against one another we may arrive at awkward postures of discomfiture (as we certainly had on this immunity issue) where the Constitution does not seem monolithic as we had hoped it to be, but fragmented, inharmonious and at war with itself. Perhaps at that instant, *logic* and not *experience* got the better of us.

5. Derivative Immunity—Analysis of the "Others" Immunity

Current immunity doctrines hold the President immune one way or other. This is an obvious trend in the analysis of constitutional provisions in the immediately preceding section. The Philippine Constitution, for instance, upheld the norm that in order for a President to be strong and fearless in the execution of executive duties, he must not in any way be disturbed from nuisance or bona fide suits during his tenure. This is the essence of the first sentence of Article VII section 15. Our aberration from commonly accepted norms was signalled by the second sentence which proclaimed two startling adjuncts to the otherwise very acceptable first sentence: 1) the post-tenure immunity *both* for the President and others, and 2) the extension of absolute immunity to "others". This section would deal on the latter adjunct, but to do so, it would have to start with a logical premise—the non-liability of the President for official acts.

No discussion of executive immunity in the Philippine setting takes off logically without a survey of the holdings and dicta of that landmark case of *Forbes v. Chuoco Tiaco*.[69] Present defenses for executive immunity, notably Minister Estelito Mendoza's, are echoes of this 1910 decision. In this case the power of the Governor-General to deport aliens was assailed,

[68] Holmes, *supra* note 33.
[69] 16 Phil. 534 (1910).

and this highest public officer of the land was theratened by a suit for damages filed by persons supposedly aggrieved by the Governor-General's execution of the powers vested in him. The Suppreme Court,[70] in support of the Governor-General's deportation orders, stated that a public officer should not bow to pressure groups and should not pursue avenues of least resistance when in the right. It further said:

> Whatever impedes or prevents the free and unconstrained activity of a governmental department, within its proper limits, tends to evil results. The civil responsibility of the chief executive would produce in him an inevitable tendency, insidious in character, constant in pressure, certain in results, to protect himself by following lines of least resistance and to temper the force of his executive arm in places and upon occasions where there was strong opposition either by powerful and influential persons or by great federated interests, and where public prejudice was intense, active, and threatening.[71]

The danger posed by nuisance suits was also foreseen by the court when it said:

> Anyone may bring an action. It needs no merits, no real grounds, no just cause, no expectation of winning, to commence suit. Any person who feels himself aggrieved by any action of the chief executive, whether he have [sic] the slightest grounds therefor or not, may begin suit. Or, not particularly desiring to bring action upon his own initiative, he may be induced thereto by any evil—disposed persons, any political rival, party antagonist, or personal enemy of the chief executive, or by any person desiring for any reason to see his administration hampered and brought into contempt by public display of the alleged inefficiency of the chief functionary. For the purposes in view, it is almost immaterial whether or not the action succeeds.[72]

The mischief posed by an ever-present opposition was not forgotten when the court added:

> Opposition papers will deem it strategy to lend their ready columns to everything that reflects adversely on the defendant. Startling headlines will appear in every issue inviting all people to read the charges against their chief executive. Occasions for delay will be found or made. The case will drag along through months of calumny, vituperation, and sensation until the people, nauseated and weary of the noise and spectacle, cry for riddance.[73]

The grim aftermath was well described by the court in the following terms:

> The bringing of an action against him because of his act in relation to a given matter would naturally prevent his taking further and other

[70] The Supreme Court here was speaking through Justice Johnson with whom Justices Arellano and Torres concurred. The quotations in this paper, notes 71 to 80 *infra*, were taken from the separate concurring opinion of Justice Moreland with whom Justice Trent concurred.

[71] Forbes v. Chuoco Tiaco and Crossfield, 16 Phil. 643 (1910).

[72] *Id.* at 644.

[73] *Ibid.*

> steps against other persons similarly circumstanced. . . . Action upon important matters of state delayed; the time and substance of the chief executive spent in wrangling litigation; disrespect for the person of one of the highest officials of the State and for the office he occupies; a tendency to unrest and disorder; resulting, in a way, in a distrust as to the integrity of government itself. . . . To bring him publicly to the bar is to breed in the public mind an unwholesome disrespect not only for his person but for his office as well; while a decision against him is, popularly speaking at least, not only a license to disregard his subsequent acts as unworthy of consideration, but also a partial demonstration of the inefficiency of government itself.[74]

The uniqueness of the office of the Chief Executive was highlighted (as Minister Mendoza did in response to the opposition resolution earlier discussed), thus:

> The chief executive is the first man in the state. He is regarded by the public generally as the official who most nearly represents the people, who most perfectly epitomizes the government and the state. An assault upon him is, popularly speaking at least, an assault upon the people. An offense against him is an offense against the state. Generally speaking, the government is good or bad as he is good or bad. To degrade and humiliate him is to degrade and humiliate the government. To put him on trial as a wrongdoer is to put on trial the government itself.[75]

A judicial inquiry into the workings of the Executive department inevitably brings to the fore the doctrine of separation of powers as one of the nuances of the controversy. The Judiciary would rely on the classic *Marbury v. Madison*[76] to jusify its supreme task of judicial review—"to say what the law is"[77]— and to decide whether an assertion of executive privilege is valid. This bottleneck was also discussed in the *Chuoco Tiaco* case when it was said:

> The power to interfere is the power to control. The power to control is the power to abrogate. Upon what reasons, then, may we base the right of the courts to interfere with the executive branch of the government by taking cognizance of a personal action against the chief executive for damages resulting from an official act; for to take jurisdiction of such an action is one of the surest methods of controlling his action. . . . If the courts may require the chief executive to pay a sum of money every time they believe he has committed an error in the discharge of his official duty which prejudices any citizen, they hold such a grip upon the vitals of the executive branch of the government that they may swerve it from the even tenor of its course or thwart altogether the purpose of its creation.[78]

Then the court differentiated its power to declare an executive act as void *vis a vis* its power to hold the chief executive civilly liable in damages:

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[74] *Id.* at 645.
[75] *Ibid.*
[76] 5 U.S. (1 Cranch) 137 (1803).
[77] *Id.* at 177.
[78] *Chuoco Tiaco*, 16 Phil. at 647.

> In the one case [i.e., the former] the results are in a real sense entirely impersonal. No evil to him directly flows from such acts. He is secure in his person and estate. In the other, he is directly involved personally in a high and effective responsibility. His person and estate are alike in danger. In the one case he acts freely and fearlessly without fear of consequences. In the other, he proceeds with fear and trembling, not knowing and being wholly unable to know, when he will be called upon to pay heavy damages to some person whom he has unconsciously injured. . . . The Governor-General, like the judges of the courts and the members of the Legislature, may not be personally mulcted in civil damages for the consequences of an act executed in the performance of his official duties. The judiciary has full power to, and will, when the matter is properly presented to it and the occasion justly warrants it, declare an act of the Governor-General illegal and void and place as nearly as possible in *status quo* any person who has been deprived of his liberty or his property by such act. This remedy is assured to every person, however humble or of whatever country, when his personal or property rights have been invaded, even by the highest authority of the state.[79]

With the immunity provision as it stands in Article VII section 15, it seems that the "policy judgment" of the Filipino people had crippled the chance of the judiciary to exercise its power of judicial review. The *absolute* immunity provision had effectively short-circuited the power of the courts to try the case on the merits to champion the cause of the aggrieved party.

Finally, the *Chuoco Tiaco* court defined the limits of the chief executive's prowess, outside of which he may be held liable like a private individual. What was enunciated in this 1910 decision is still the bed-rock of modern immunity doctrines. It said:

> [The Governor-General] is liable when he acts in a case so plainly outside of his power and authority that he can not be said to have exercised discretion in determining whether or not he had the right to act. What is held here is that he will be protected from personal liability for damages not only when he acts within his authority, but also when he is without authority, *provided* he actually used *discretion* and judgment, that is, the judicial faculty, in determining whether he had authority to act or not. In other words, he is entitled to protection in determining the question of his authority. If he decide [sic] wrongly, he is still protected provided the question of his authority was one over which two men, reasonably qualified for that position, might honestly differ; but he is not protected if the lack of authority to act is so plain that two such men could not honestly differ over its determination. In such a case, he acts, not as Governor-General, but as a *private individual* and as such, must answer for the consequences of his act.[80]

The point to remember in *Chuoco Tiaco* is that all the conclusions were based on the unmistakable premise *that the Governor-General is an incumbent,* and the executive privilege being upheld here is all that which is vested in him. Nothing in this decision justifies the extension of immunity

[79] *Id.* at 649.
[80] *Id.* at 649-50.

to other subordinate officers. Thus a commentator, following closely this decision enumerated three reasons why public policy forbids the *President* from being civilly liable for damages for official acts:

> 1. It will destroy the independence of his office. He will be forced to follow the line of least resistance.
> 2. It will be prejudicial to public service. Action upon important matters will be delayed.
> 3. It is inimical to public order. Disrespect will be engendered for the person of one of the highest officials of the state and for the office he occupies.[81]

But this being the age of the big bureaucracy, the superior shielding subordinates is becoming routine, not so much to protect him as to preserve the secrets of government.[82] Secrecy of information is still being pressed as an element of executive privilege.[83] The tremendous growth in the functions of the National Government has necessarily multiplied executive agents by the thousands. The President cannot perform this multiplicity of services without authority and without an army of subordinates.[84] Delegation of power has multiplied a hundredfold. In a way, these subordinates act as alter egos of the President. While it is true that the people elected *one* President and entrusted in his the powers residing in the sovereign people, the inevitability of countless delegation of powers gave birth to the doctrine of qualified political agency.[85] The extension of immunity to close subordinates may be explained by this doctrine. But while the sweep of the doctrine of qualified political agency is limited, the sweep of the extension of immunity in the constitutional provision is as broad or as narrow depending on the legal sensitivity of the court dutibound to interpret it and the flex of current public policy. Explained the author last quoted:

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[81] GONZALES, ADMINISTRATIVE LAW, LAW ON PUBLIC OFFICERS AND ELECTION LAW 296 (1972).

[82] In the 1838 case of *Kendall v. United States*, 37 U.S. (12 Peters) 524 (1838), the Postmaster General, then under the President and acting on presidential instructions, refused to pay money owed by the United States for carriage of mails. Congress passed a law directing payment, and when this was refused by the Postmaster General, mandamus was brought against him to compel payment. Although the executive power is vested in the President, the Supreme Court declared:

> It by no means follows that every officer in every branch of that department is under the exclusive direction of the President. . . . it should be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution.

The *Kendall* Court said that the contrary principle would clothe the President with a power entirely to control the legislation of Congress and paralze the administration of justice. Whether the rights asserted by a department head are "protected by the Constitution" was not left for final decision by the President, but committed to the "ultimate interpreter" of the Constitution, the judiciary. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 194 (1974). *See* CORWIN, THE PRESIDENT 1787-1957: HISTORY AND ANALYSES OF PRACTICE AND OPINION 110-118 (1957).

[83] Corwin, *supra* note 82, at 111-18.

[84] PATTERSON, PRESIDENTIAL GOVERNMENT IN THE U.S.: THE UNWRITTEN CONSTITUTION 77 (1947).

[85] Gonzales, *supra* note 81 at 298.

> Heads of executive departments are mere assistants and agents of the Chief Executive, and, except in cases where the President is required by the Constitution or law to act personally, the multifarious executive and administrative functions of his office are performed by and thru the executive departments, and the acts of the secretaries, performed and regulated in the regular course of business, are, unless disapproved or reprobated by the Chief Executive, presumptively acts of the President.[86]

How would the second sentence of Article VII section 15 stand the test of the current doctrine on *derivative immunity?*

It is the position of this paper that the extension of the immunity to subordinates in the second sentence of Article VII section 15 is no less than derivative immunity at work or, more precisely, *derivative* absolute immunity. Derivative precisely because the subordinate's immunity was taken from or derived from the superior's. And it is asserted here as a corollary that elevating this immunity as a constitutional fact and awarding derivative immunity to "others" has short-circuited and oversimplified the judicial process cutting off the most valuable contribution of the courts to effectuate the right of Filipinos to petition the Government for redress of grievances.[87] What may have probably been a crucial escape valve to dissatisfaction over executive performance has been sealed. Why is this so? Absolute immunity operates as a complete bar to relief.[88] It is a total shield from civil liability because officials entitled to absolute immunity, as the American doctrine goes, need *not* defend on the merits of the complaint;[89] the court is bound to observe the immunity and will dismiss the case early. In other words, an absolute immunity defeats a suit at the outset so long as the official's act has not "wandered completely off the official reservation."[90] Hence, for those who share the President's immunity in a derivative manner, the advantages are clear, and to presume that they who are derivatively immune actually exercised discretion, had not "wandered,"

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[86] *Id.* at 299.

[87] Absolute immunity defeats a suit at the pre-trial level, so long as the official's alleged infractions were within the scope of the immunity. On the other hand, *qualified* immunity must be pleaded as an affirmative defense. It is determined by the evidence at trial, which includes an examination of the official's actions and motivations. Kennedy, *supra* note 2 at 957. Absolute immunity affords procedural advantages for the defendant, being a total shield from civil liability, whereas qualified immunity is merely an affirmative defense on the merits which must be alleged in the pleadings and factually proven by the defendant. If performing a discretionary act within the scope of his duty, the government defendant who receives absolute immunity may curtail the litigation at the pleading stage. The defendant under qualified immunity, on the other hand, may be subjected to the time and expense of further proceedings as well as the possible need to prove his good faith and reasonable belief, if those matters provide an issue of fact. The phrase "qualified immunity" is in a sense a misnomer: to provide immunity from liability, qualified immunity requires elements of proof by the defendant. Comment, *supra* note 2, at 629. *See* note 163 *infra* and accompanying text.

[88] Stein, *supra* note 2, at 760.

[89] Orenstein, *Recent Development, Presidential Immunity from Civil Liability, Nixon v. Fitzgerald,* 68 CORNELL L. REV. 237 (1983).

[90] *Ibid. quoting from* Butz v. Economou, 438 U.S. 478, 519 (1978) (Rehnquist, J., dissenting).

and need not defend on the merits of the complaint after having shown to have exercised discretion to the satisfaction of the court—this takes due process out for a walk.

The danger of endorsing the concept of derivative immunity couched in the second sentence of the provision is that it glosses over the nuances of the concept or assumes that the elements of derivative immunity are *already* fulfilled a fact. Like the discretionary-function immunity, derivative immunity shares the same purpose: to protect the discretionary functions of government officials.[91] Their specific roles in the service of this purpose differ however. Discretionary-function immunity (as very well exemplified in the *Chuoco Tiaco* case) protects the officer who has made a discretionary decision from liability for its consequences. The role of derivative immunity, on the other hand, is not to protect the officer who made the discretionary decision, but the subordinate who carried it out. Its *immediate* effect is to protect the subordinate, but its *ultimate* effect is to protect the discretionary function of the superior.[92] Therefore, derivative immunity "exists as a necessary corollary of the superior's privilege."[93] Here is where the *after-incumbency* immunity of subordinates should crumble, for the provision states: "Thereafter, no suit whatsoever shall lie for official acts done... *by others* pursuant to his specific orders..." Because if the subordinate's immunity exists as a corollary to the superior's privilege, absent the superior's privilege, derivative immunity vanishes—or should. Since the President's powers terminate at the end of his tenure and the privileges appurtenant to office cease at this moment, there is no more basis for derivative immunity to exist. Hence, to retain this type of immunity for subordinates after the incumbency of the superior, it must have a name different than derivative.[93A]

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[91] Sowle, *The Derivative and Discretionary-Function Immunity of Presidential and Congressional Aides in Constitutional Tort Actions*, 44 OHIO ST. L. J. 960 (1983).

[92] *Ibid.*

[93] In the case *Kermit Const. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F. 2d 1, 3 (1st Cir. 1976), the court asserted:

> At the least, a receiver who faithfully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized in the Supreme Court.... It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tension between receiver and judge seems inevitable.

[93A] Undoubtedly, this paper has its core in the doctrine of derivative immunity. It was an unavoidable theoretical construct without which analysis of the constitutional provision cannot take rational form. That this shall be a key premise of this paper was so stated in the body. The 1981 plebiscite ratifying the post-tenure immunity necessarily watered down any legal persuasion this doctrine may have had. The plebiscite results was concededly a political judgment made by the Filipino people which had expressed its mandate beyond the reach of any possible doctrine save, perhaps, for critical purposes. It is only along this vein that derivative immunity and any related concept persist as an analyzing medium all thoughout this work.

In the American case *Heine v. Raus*,[94] it was stated that one of the objectives of derivative immunity is to prevent the inhibition of the superior's exercise of discretion during incumbency that would result in placing on the superior the "compelling moral obligation" to defend or indemnify a subordinate subjected to a civil action for executing the superior's orders. Another objective mentioned is to protect the exercise of discretion of the superior from the refusals of subordinates during the superior's incumbency to execute decisions out of fear of civil liability.[95] These premises annul entirely the justification for a subordinate's derivative immunity after the President's tenure. Because after his tenure, the President is no longer subject to the normal obligation to indemnify or shield his subordinate—unless he wants to; neither would a subordinate's refusal to obey matter much after his incumbency. The sense, therefore, in which we incorporated post-tenure derivative immunity in our Constitution is misleading; the second sentence of Article VII section 15 in providing for post-tenure immunity for a subordinate confers such privilege solely for the benefit of the subordinate and not the President's. The imperative set in the *Heine* case is clear: derivative immunity goes hand in hand with the incumbency of the superior. Incumbency of the superior is its greatest justification. Post-tenure immunity as enshrined in the Constitution is a rebel off tangent this accepted postulate. Be that as it may, this was ratified by the Filipino people through a plebiscite and validated by a majority vote. The point is this: by so choosing to depart from the close-knit logic of the doctrine of derivative immunity whereby the immunity was derived from the one superior source, now each subordinate may be regarded as a source in itself because his immunity is self-serving in the sense that it need not protect the discretionary function of the superior which had ceased after incumbency. As it were, in an ideal galaxy where there is one sun, the Filipino people created more.

American case law in derivative immunity tells us that there are four requirements a defendant must meet to be entitled to derivative immunity:

First, the defendant's conduct in question must have been ordered, directed or approved *in advance* by the defendant's superior;[96]

Second, the defendant must have acted within the scope of his authority when he engaged in that conduct;[97]

Third, the conduct must be such that the superior would have been entitled to immunity had he engaged in the conduct himself;[98]

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[94] 399 F. 2d 785 (4th Cir. 1968).

[95] *See* note 93 *supra* and accompanying text.

[96] *See e.g.*, Chagnon v. Bell, 642 F. 2d 1248, 1255 n. 9 (D.C. Cir. 1968); Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F. 2d 1, 3 (1st Cir. 1976); Heine v. Raus, 399 F. 2d 785 (4th Cir. 1978).

[97] *See e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 312 (1973); Gravel v. United States, 408 U.S. 606, 628-29 (1972).

[98] *See* Eastland v. United States Servicemen's Fund, 491, 507 (1975).

Fourth, the extension of derivative immunity to the subordinate must be necessary and appropriate to protect the discretionary authority of the superior.[99]

Alarmingly, the grant of derivative absolute immunity in the present Constitution leaves out so much of the nuances in the concept, like the requirements aforementioned, such that an official who invokes this privilege, it being absolute, need not defend on the merits and could rely instead of the early dismissal of the case. Without trial on the merits, there is a danger for the courts to take the immunity at face value and not dig deep into its essential requisites, leaving the aggrieved party aggrieved. For instance, one writer believed that it should be insufficient that the conduct of the subordinate was authorized in the broad sense, that it was within the scope of his authority, or that it was ratified by the superior *after* the fact.[100] Because only if the subordinate's conduct was ordered or approved in advance is the superior's discretionary authority at stake in a claim against the subordinate. What seems proper here is not to apply the immunity wholesale. There must be an inquiry into the circumstances, there must be a trial on the merits so that the delicate requirements that support derivative immunity be scrutinized piecemeal. Only in this way is due process made to co-exist with this extraordinary immunity and only in this manner can the courts act with fealty to the principle of equal justice under law. After all, this principle requires that the law treat each individual equally without regard to the office held. There are soothing words in *Marbury v. Madison* to this effect: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[101] Dicey conforms with this venerable theme when in England he wrote: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[102]

Finally, one fine commentator suggested that totally eliminating the fear of litigation in public officials may *not* be the ideal goal in a civilized society. He said:

> The truth is, we do not in the present state of man and government, want anybody to be fearless. Citizens and officials alike ought to be afraid of some things, including convictions for crimes and the risk of civil liability if they wrong anybody. The absolute privilege protects an official from fear of the consequences of his malice, but it seems to me that this is one of the fears we should want him to have.[103]

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[99] *See Gravel*, 408, U.S. 606, 616-17 (1972); *Cf. Heine* 399 F. 2d 785, 793 (4th Cir. 1968). *See also* Forsyth v. Kleindienst, 599 F. 2d 1203 (3rd Cir. 1979).

[100] Sowle, *supra* note 91 at 963.

[101] 15 U.S. (1 Cranch) at 163.

[102] DICEY, THE LAW OF THE CONSTITUTION 193 (10th ed. 1959).

[103] Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 7 (1962).

6. *The Alternative: Qualified Immunity*

Nowhere else in our history had presidential powers been used to the hilt than in the last decade. There were vast and wide-ranging constitutional changes; we tried having a President being a "symbolic head of state",[104] and then at midstream reined up by making him "head of state and chief executive"[105]—all this in less than ten years. The past decade was no less than *revolutionary*—an evolution compressed. A President is most unpopular who served in the most stirring times. Under their leadership, wars were fought, periods of transition were safely passed, and important social and economic changes occurred.[106] It is but natural that during this period fierce passions should be aroused both for and against him. It is not hasty to add that it is also during this stirring times that immunity doctrines had to be molded to accommodate the rising passions and to tide over the chief executive and his men to safe haven. Here is where the "vindictiveness-argument" of the "yes" camp (re COMELEC Primer) will find full contextual significance. After all, it is still the President's duty to bring the ship of State safely through storm and battle.

America's immunity doctrine swerved this way and that under the stresses of the Civil War. Before this war, the settled doctrine was that an official was liable *notwithstanding* his superior's orders not only for any act that contravened the constitution but also for constitutionally permissible acts which consituted common torts since they violated standards of necessity or due care.[107] As the Civil War raged on, the American Congress enacted an "indemity" act in 1863 followed closely by a "privilege" act and finally an "immunity" act.[108] The act of 1863 provided:

> [T]hat any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defense on all courts to any action or prosecution, civil or criminal, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done under and by virtue of such order. . . .[109]

The act fixed a two-year statute of limitations. In 1866, Congress amended this act making it more explicit to protect civil or military personnel per-

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[104] CONST. (1973), art. VII, sec. 1.

[105] CONST. art. VII, sec. 1.

[106] COYLE, ORDEAL OF THE PRESIDENCY 396 (1960).

[107] Engdahl, *supra* note 2 at 48.

[108] A technical distinction exists between the terms "privilege" and "immunity": Privilege avoids liability for tortious conduct only under particular circumstances, and because these circumstances make it just and reasonable that the liability shall not be imposed, and so go to defeat the existence of the tort itself. On the other hand, an immunity avoids the liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because the status or position of the favored defendant; and it does not deny the tort, but the resulting liability. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971).

[109] Act of March 3, 1863, ch. 81 § 4, 12 Stat. 755, 756.

forming or assisting in performing any order not only of the President but of the Secretary of War.[110]

But the more interesting and more relevant aspect of these enactments were the adjudication of various courts with regard to them. In *Ex parte Milligan,*[111] it was held that these statutes could not constitutionally be applied so as to preclude recovery of damages from the officer for acts which violated *constitutional* rights. In *Griffin v. Wilcox,*[112] the Supreme Court of Indiana held that:

> This [1863] act was passed to deprive the citizens of all redress for illegal arrests and imprisonments; it was not needed as a protection for making such as are legal, because the common law gives ample protection. . . . The question here arises, then, can Congress enact that a citizen shall have no redress for a violation of his rights, secured by the following provisions of the constitution of the United States. . . ?
>
> These sections [Amendments 4 and 5] prohibit the passage of a law by Congress, authorizing the arrest of the citizen, without just cause, because such arrest deprives him of his liberty.[113]

The United States Supreme Court never had a chance to speak on this issue directly, but in *Motchell v. Clark*[114] which was disposed of by the Court on a procedural point, Mr. Justice Field went on to speak on the merits (re act 1863), thus:

> The statute cannot be construed to give protection to any one in the commission of unlawful acts. Neither *President nor Congress* can confer immunity for acts committed in violation of the *rights of citizens*. . . . [Where the courts are open] the rights of citizens are just as much under constitutional security and protection in time of war as in time of peace. . . . We sometimes hear the opposite doctrine advanced; but it has no warrant in the principles of the common law, or in the language of the Constitution. . . .[115] (emphasis supplied)

Then Justice Field brought forth a crucial distinction:

> Congress may provide for indemnifying those who, in great emergencies, acting under pressing necessities for the public, invade private rights in support of the authority of the government; but between acts of indemnity in such cases, and the attempt to deprive the citizen of his right to compensation for wrong committed against him or his property, or to enforce contract obligations, there is a wide difference, which cannot be disregarded without a plain violation of the Constitution.[116]

Two competing interests are at stake in the context of modern immunity doctrines: on one side is the private desire to obtain redress for government

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110 Act of May 11, 1866, ch. 80, § 1, 14 Stat. 46.
111 71 U.S. (4 Wall.) 2 (1866).
112 21 Ind. 370 (1863).
113 *Id.* at 370, 372-73.
114 110 U.S. 633 (1884).
115 *Id.* at 633, 640.
116 *Id.* at 648-49.

wrongs and the public interest in both punishment and deterrence; on the other side is the public claim of shielding officials from liability so that they do not become overly cautious in the performance of their duties.[117] In support of the latter stand, Judge Learned Hand in *Gregoire v. Biddle*[118] had this to say:

> To submit officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or most irresponsible, in the unflinching discharge of their duties. . . . [Therefore] it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[119]

The premise followed by the argument seems to be that injuries caused by government officials are few and far apart, and that these constitute the exception rather than the rule in the sweep of government interaction with the public. It also seems that the argument hinges on proposition that there being few unscrupulous government officers in the service, to submit them to the bar of justice may implicate the majority who have otherwise served with honor and distinction. Since the wheels of justice grind slowly, this terribly indecent exposure to personal liability and the legal expenses of personal defense would discourage public service. This kind of argument had more recently received a doubtful stare. Chief Justice Earl Warren, in his dissent in *Barr v. Matteo*[120] stated in response to the *Biddle* argument that this would result in the complete abrogation of the plaintiff's ability to vindicate his rights. Arguing for qualified immunity (as opposed to absolute immunity), he further stated that though a *qualified* immunity standard would expose the government official to greater danger of judicial action in that such a standard would permit the action to survive a motion to dismiss for failure to state a claim upon which relief may be granted, nevertheless, in case of patently vexatious claims, the defendant may curtail the action through a motion for summary judgment.[121] Thus, it is not altogether true that imposing a *qualified* immunity standard would submit all officials, the innocent as well as the guilty, to the burden of a trial. That qualified immunity would discourage public service, Mr. Justice William Brennan, Jr. dismissed this argument in his own stinging dissent in *Barr* calling it "specious" and "a gossamer web self-spun without a scintilla of support to which one can point".[122]

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117 *The Supreme Court 1981 Term*, 96 HARV. L. REV. 226, 229 (1982).

118 117 F. 2d 579 (2d Cir. 1949).

119 *Id.* at 581.

120 360 U.S. 564 (1959).

121 FED. R. CIV. P. 51. Our own Revised Rules of Court offers this following counterpart: Rule 34, sec. 2 *Summary judgment for defending party*—a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory relief is sought may, at any time, move with supporting affidavits for a summary judgment in his favor as to all or any part thereof.

122 Barr v. Matteo, 360 U.S. 564, 590 (1959).

Another commentator described the argument as "a wry blend of fairy tale and horror story."[123] The oft-quoted statement for the defense of the aggrieved citizen against big government is in *U.S. v. Lee*,[124] which is now again tolled amidst the clangor of perfectly tuned bells:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . And every man who by accepting office participates in its functions is only more strongly bound to submit to the supremacy. . . .[125]

Before we begin in earnest with a survey of the *qualified immunity doctrine*, there is a very important issue on immunity, in general, which has significant bearing on the immunity provision in our Constitution. American courts have translated the balance of competing interests mentioned above into a doctrinal framework structured along *functional* lines.[126] Although two very recent cases[127] had somewhat obscured the merit of this *functional approach* in determining immunity cases, this approach seems to have been neglected in the sweeping immunity provision contained in Article VII section 15. According to this approach, acts that entail no legitimate discretion—ministerial acts and acts in excess of authority—enjoy *no* immunity protection. Discretionary functions, on the other hand, are protected by *qualified* (not absolute) immunity.[128] Good-faith mistakes do not give rise to liability, but clear violations of the law or malicious acts are not protected. Absolute immunity is granted only sparingly—to shield officials in the performance of *legislative*,[129] *prosecutorial*,[130] *and judicial* (*adjudicative*) *functions*[131] exclusively. This is the essence of the functional approach to immunity. It is to be noted—and noted well—that these rare pockets of absolute immunity attach only to the *task* and not to the office.[132] Thus, prosecutors are only qualifiedly immune in the performance of administrative and investigative duties but absolutely immune

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[123] Gray, *supra* note 2, at 339.

[124] 106 U.S. 196 (1882).

[125] *Id.* at 220.

[126] *The Supreme Court, supra* note 117, at 229.

[127] Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982); Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

[128] The Supreme Court, *supra* note 117, at 229.

[129] *See e.g.*, Gravel v. United States, 408 U.S. 606 (1972); Tenny v. Brandhove, 341 U.S. 367 (1951).

[130] *See e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976); Gregorie v Biddle, 339 U.S. 949 (1950); Yaselli v. Goff, 12 F. 2d 396 (2d Cir. 1926).

[131] *See e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967) Gray, *supra* note 2, at 310 gives his own skeptical view on judicial absolute immunity, thus:

> The judge has truly been the pampered child of the law, for he is among those privileged few who are allowed to fulfill their duties not only stupidly or negligently, but wilfully, maliciously, corruptly or just plain dishonestly yet escape liability to those damaged by his conduct. A cynic might be forgiven for pointing out just who made this law. . . .

[132] *The Supreme Court, supra* note 117, at 230.

in the performance of prosecutorial functions. In the case of *Nixon v. Fitzgerald,*[133] where the President of the United States was held entitled to absolute immunity from civil damage liability predicated on his official acts, this decision was roundly criticized for shifting the focus from a legal inquiry based on *function* to one based on the *office* of the Presidency itself.[134] In *Nixon,* the U.S. Supreme Court had impliedly overturned its adherence to the functional analysis in determining the scope of official immunity as expressly enunciated in the landmark cases of *Imbler v. Pachtman*[135] and *Butz v. Economou.*[136] By granting officewide immunity in *Nixon,* the court had wrapped the President in a protective cloak denied to all other government officials[137] and thus abdicated its responsibility "to say what the law is" through the conventional case-by-case approach. With Article VII section 15, the immunity doctrine here likewise rejected the functional analysis and favored an officewide immunity in favor of the President, but included in this hermetic wrapping also an officewide immunity to "others" who may come within the ambit of presidential orders. This shift from the functional approach is dangerous because failure to particularize pockets of immunity, as set forth in American jurisprudence for *particular* function, may indeed be giving *carte blanche* to the President and "others" for *whatever* functions. This is the alarm raised by several commentators in the wake of *Nixon v. Fitzgerald.*[138]

Qualified immunity have had a fine train of precedents before *Nixon,* having been coupled with the functional approach in determining an official's liability. It is a postulate ingrained in the functional approach that despite government activity becoming more complex and sophisticated as to result in an endless permutation of delegation and re-delegation of authority into functions, the functions downstairs do *not* become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[139] Thus, lower federal courts in the United States extended absolute immunity from tort actions to lower federal executive officials.[140] The important issue to settle, however, is whether immunity should be extended to executive officials for conduct that violates an individual's *constitutional* rights. There were cases wherein the U.S. Supreme Court had a chance to address this issue squarely.

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[133] 102 S. Ct. 2690 (1982).

[134] The *Nixon* Court reasoned that the immunity granted was "functionally mandated" by the President's unique constitutional status and the separation of powers, and was supported by history and public policy.

[135] 424 U.S. 409 (1976). The *Imbler* Court asserted that function rather than office would be the touchstone for granting absolute immunity in the future.

[136] 438 U.S. 478 (1978).

[137] *The Supreme Court, supra* note 117, at 230.

[138] *See* Stein, *supra* note 2, at 759; Cunningham, *supra* note 1, at 557; Orenstein, *supra* note 89, at 236.

[139] Kennedy, *supra* note 2 at 964, *quoting from* Spalding v. Vilas, 161 U.S. 483, 573 (1896).

[140] *Ibid.*

Immunity for federal executive officials had its origin at common law.[141] The cornerstone of the doctrine is that federal executive officials are *absolutely immune* from suits against common law tort claims. And this was exemplified in the 1896 case of *Spalding v. Vilas.*[142] In this case, the Postmaster General, then a member of the President's Cabinet, was sued for malicious defamation when he allegedly circulated a letter which impugned the motives of an attorney who represented local postmasters in a salary dispute. The Supreme Court held that the head of an *executive* department was absolutely immune from suit for actions within the ambit of his control and supervision. The rationale being that exposure to suits would cripple effective public administration of the executive branch. The Court also held that even if the Postmaster General had acted with malice, he was still absolutely immune from civil suits for discretionary acts within the scope of his immunity. But even before *Spalding,* the Supreme Court had already held a judge absolutely immune from civil suits for judicial acts in the 1871 case *Bradley v. Fisher.*[143]

Then absolutely immunity for tort claims was extended to lower level federal officials in *Barr v. Matteo* (1959),[144] a case wherein the acting director of the Office of Rent Stabilizations was sued for libel for releasing a press statement. The Court here ruled that "it is not the title of his office but the *duties* entrusted to him which governs the type of immunity afforded the official." Whether immunity should be extended to executive officials for conduct which violates constitutional rights,[145] the U.S. Supreme Court raised the specter of private litigation against state executive officials by giving expansive interpretation to Section 1983 of the U.S. Code[146] in the 1961

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[141] *See Spalding,* 161 U.S. 483, 498 (1896).

[142] 161 U.S. 483 (1896).

[143] 80 U.S. (13 Wall.) 335 (1871). *See* note 131 *supra* and accompanying text.

[144] 360 U.S. 564 (1959).

[145] There is a world of difference between a constitutional tort (that which violates the Bill of Rights) and a common law tort. The former may involve an unreasonable search and seizure or a taking of life or property without due process; the other may involve a common law tort of defamation. The qualitative difference as to the severity of the injuries is clear. In constitutional tort, the aggravated quality of the conduct had caused an injury that transcends mere pecuniary damages and may well be "outrageous". The alleged injury in constitutional tort is more fundamental, grave and compelling than that in common law tort. Where fundamental human rights guaranteed by the federal government are violated, it is both sound and just that the court should limit the defendant to *qualified immunity*. In common law tort actions, the appropriateness of such limitation is not so manifest. Also, the constitutional tort action serves a broader societal function. In imposing personal liability on the government defendant, the constitutional tort action may influence official conduct and force changes in stanndards of behavior. Comment, *supra* note 2. at 647-49.

[146] 42 U.S.C. § 1983 (1966 & Supp. IV 1980). Section 1983 provides in part: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person without the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

case of *Monroe v. Pape.*[147] In *Monroe*, the Court held that state officers were *not* absolutely immune from suit where federal rights were involved. Much later, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971),[148] the Supreme Court developed a broad cause of action against federal executive officials arising directly under the federal constitution.

Although absolute immunity was still upheld in the traditional "pockets" via the functional analysis, it will be seen below that the U.S. Supreme Court began consistently adopting the *qualified immunity standard* especially in section 1983 suits. In the 1973 case of *Scheuer v. Rhodes,*[149] the Governor of Ohio and other Ohio state officials were sued under section 1983 for violating the constitutional rights of students killed by the National Guard during the anti-Viet Nam War demonstrations at the Kent State University. The Supreme Court here departed from *Spalding* and *Barr,* and held that state officials would only be entitled to a qualified immunity provided that a "reasonable basis" and a "good faith" belief could be shown for doing the questioned act or conduct. This semblance of an immunity test in *Scheuer* was finally developed in the 1975 case of *Wood v. Strickland.*[150] The *Wood* Court held that the test to determine whether qualified immunity is available or not contains both an *objecive* and a *subjective* component. The objective component demanded that the Court decide whether the official knew or should reasonably have known that his acts were illegal. The subective component required the court to determine whether the official had acted with malice. The presence of *knowledge* or *malice* would defeat the claim of qualified immunity. In other words, there would be no immunity from suit if the official knew or should have known that he was violating one's constitutional rights *or* if the action was taken with malice to deprive one of his constitutional rights.[151]

With all these precedents, the U.S. Supreme Court, in *Butz v. Economou* (1978)[152] examined the degree of immunity available to federal executives in an action based directly on the constitution. In this case, Secretary of Agriculture Butz was sued for alleged constitutional violations of a commodities merchant. Butz allegedly instituted an investigation of his commodities futures company without proper notice. The Court here concluded that the level of protection for federal executive officials should be no greater than that afforded state executive officers in Section 1983 actions, and held that only qualified immunity would be afforded them whose actions are alleged to have violated a claimant's constitutional rights. By establishing the qualified immunity standard to be applicable to cabinet-level officials, *Butz*

147 365 U.S. 167 (1961).
148 403 U.S. 388 (1971).
149 416 U.S. 232 (1974).
150 420 U.S. 308 (1975).
151 In *Harlow v. Fitzgerald,* the Court eliminated the subjective component in the qualified immunity test.
152 438 U.S. 478 (1978).

was, in a way, a launch pad for the eventual inquiry on the kind of immunity to be accorded to the President of the United States and presidential aides.

In *Halperin v. Kissinger* (1979),[153] plaintiff instituted a complaint against the President, the Attorney General, the National Security Adviser and a presidential aide alleging both statutory and fourth amendment violations arising from the wiretapping of his office while he was staff member of the National Security Council. The District of Columbia Circuit Court relied on the subjective and objective standards laid down in *Wood* and followed through in *Butz*, and held that executive officials, *including the President*, were entitled only to a qualified immunity from suit. The district court here rejected the argument set forth by then President Nixon that he was absolutely immune; the district court said that before it could accept such argument there must be a judicial recognition that sets the President's status apart from other high executive officials and that the Constitution impliedly exempts him from all liability. This district court proved adamant in setting the presidency apart from other high executive officials and clung stubbornly to the belief that the Constitution did not dictate such separate privilege. The U.S. Supreme Court reviewed *Halperin* but failed to address the immunity issue. Then came the landmarks *Harlow v. Fitzgerald*[154] and *Nixon v. Fitzgerald*.[155]

These two cases were hinged together by one set of facts: In January of 1970, A. Ernest Fitzgerald, a management analyst, lost his job in the U.S. Air Force. The dismissal came fourteen months after he testified before a joint congressional subcommittee that cost-overruns on the C-5A transport plane would reach an astronomical $2 billion. The Air Force explained Fitzgerald's dismissal as part of a departmental reorganization and force reduction. Fitzgerald insisted that he was a victim of an unlawful retaliation and conspiracy among his superiors. He also invoked statutory and first amendment rights. The Supreme Court in a five-to-four decision[156] held that the President was entitled to *absolute* immunity from suit for his official acts. Writing for the majority, Mr. Justice Lewis Powell, Jr. found that the Constitution supported a grant of immunity to the President, stressing that the President was entrusted with wide-ranging responsibilities of utmost discretion and sensitivity which made the honored functional approach quite dispensable.[157] Since the President is unique among other government officials,

[153] 606 F. 2d 1192 (D.C. Cir. 1979).
[154] 102 S. Ct. 2727 (1982).
[155] 102 S. Ct. 2690 (1982).
[156] Chief Justice Burger concurred. Justice White wrote a lengthy dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined. Justice Blackmun argued in a separate dissent, joined by Justices Brennan and Marshall, that the writ of certiorari should have been dismissed as improvidently granted in light of the settlement agreement between Nixon and Fitzgerald.
[157] One commentator opined that an additional justification for absolute immunity was the *comparability* of the President's functions to those of other officials previously granted absolute immunity. Bullard, *supra* note 32, at 766.

precedents recognizing qualified immunity for governors and cabinet members are "inapposite" on the issue of presidential immunity. Protected by the doctrine of separation of powers, the Court recognized the President's independence and explained that the judiciary may assert jurisdiction only when the purpose for such outweighs the dangers of intruding on executive branch authority.[158] The Court cited at least two precedents of *justifiable* Court intrusions: 1) *U.S. v. Nixon*,[159] where the Court acted to safeguard fairness in criminal trials. Here the Court used a balancing test to weigh the President's interest in confidentiality against the judiciary's article III responsibility to ensure fairness in the criminal justice system. The Court upheld the issuance of a subpoena duces tecum by Watergate Special Prosecutor Leon Jaworski to compel in-camera disclosure of taped White House conversations; 2) *Youngstown Sheet and Tube Co. v. Sawyer*,[160] where the Court held that President Truman exceeded his constitutional and statutory authority when he ordered the seizure of the nation's steel mills to avert a nationwide strike. Justice Jackson pointed out the separation of powers balance in his concurrence: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[161] The Court concluded that Fitzgerald's private suit for damages does not warrant the exercise of jurisdiction over the President.

The Court relied on these remedies as checks to the President's abuse of power: the impeachment mechanism, the President's desire for re-election, historical concern and scrutiny by the Congress and the press.

Since White House aides Bryce Harlow and Alexander Butterfield were also impleaded by Fitzgerald in the political conspiracy against him, the case against these two needs special attention. In *Harlow*, the Court held that presidential aides generally enjoy qualified immunity from suit. The Court relied on the policy consideration in *Butz* and concluded that qualified immunity for executive aides "represented a balance of societal values that appropriately recognized both the rights of citizens and the need to protect officials in the exercise of their discretionary duties." Clearly, the Court here followed the functional approach in holding as it did. Since the aides exercised *no* judicial, legislative and prosecutorial functions, absolute immunity were denied them. However, the *Harlow* Court left the door open for presidential aides to assert absolute protection where the questioned actions were connected to sensitive areas like national security and foreign policy. These areas may evolve as future strongholds for absolute immunity not only in the American setting but in ours. Thus, before an aide would be

158 Stein, *supra* note 2, at 766.
159 418 U.S. 683 (1974).
160 343 U.S. 579 (1952).
161 *Id.* at 635.

entitled to absolute immunity, he must first demonstrate that the responsibilities of his office embrace a sensitive function and that he was discharging this function in executing the disputed act. The future may see cases wherein officials are bound to slant their functions towards areas of national security and foreign policy however far-flung and incongruous the question act may be.[162] The *Harlow* decision also eroded the subjective component of *Wood* because of the protracted litigations and personal expenses which precipitate this component into an issue of fact requiring a tedious proceeding as well as a resolution by jury. The Court said that reliance on objective reasonableness alone would, through the summary judgment process, avoid excessive disruption of government activity and abate unsubstantial claims based on bare allegations of malice.

Despite the barrage of criticisms engendered by *Nixon v. Fitzgerald,* the prevailing doctrine managed to create a dichotomy within the executive branch: absolute immunity for the President and qualified immunity for his aides and cabinet members. In the Philippines, this dichotomy is nonexistent in view of Article VII section 15 holding both the President and "others" immune during and after the President's tenure. The qualified immunity doctrine would have been ideal in this setting because it restores the primacy of the rule of law and the rule of accountability of public officers.[163] With its twofold hurdles, the subjective and objective tests, public officials would be more cautious in the discharge of their duties. The danger of a protracted lawsuit precipitated by the subjective component or, say, a plain unadulterated nuisance suit may be remedied by the approach suggested by Judge Gerhard Gesell, concurring in *Halperin,* which required a pretrial determination of the sufficiency of the paintiff's evidence on the immunity issue. Judge Gesell proposed that the plaintiff establish "before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act

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162 For example, American agricultural policy established by the Secretary of Agriculture could arguably be as much "foreign policy" matter as a decision of the Secretary of State. The U.S. Government had placed several restrictions on the shipping of American farm goods to the Soviet Union due to the latter's involvement in Afghanistan. Kennedy, *supra* note 2, at 974.

163 A qualified immunity takes into account the functions and responsibilities of each officer acting within the scope of his authority. This functional approach to immunity grants absolute immunity to a public official when the official acts pursuant to those functions of office for which a full exemption from liability is necessary. When not acting pursuant to a function of office for which absolute immunity is essential, a qualified immunity protects the public official from liability, unless the official knew, or reasonably should have known, that the action taken violated "well established" law. The justification for qualified immunity for public officials is that, while immunity may be necessary for the performance of certain functions, it should not be extended to such a degree that it abrogates the fundamental precept of individual accountability for a public officer's intentional misuse of power. The qualified immunity doctrine reflects a policy that the burden of possible interference with the discharge of public official's duties can be outweighed by the need for individual redress of grievances resulting from deliberate violations of the law. Cunningham, *supra* note 1, at 564-565.

with subjective or objective good faith".[164] The limited protection afforded by qualified immunity would keep well-positioned government officials in check, and the nagging possibility that they may not indeed pass both hurdles on the way to acquiring this immunity would make them soft-pedal a bit, whereas they would have ridden roughshod on the constitutional rights of their fellowmen with the guarantee of derivative absolute immunity. As the U.S. Supreme Court observed in *Butz*, "the greater power of [high ranking] officials affords a greater potential for a regime of lawless conduct,"[165] and therefore the fact alone that an office is powerful provides the most potent justification for a grant of qualified rather than absolute immunity. Echoing Becht,[166] while qualified immunity increases the chances by which the aggrieved party may ably bring suit against an erring public official making his errors more prone to discovery and open to public scrutiny, and making him more fearful of the consequences of his actions, yet "this is one of the fears we should want him to have." As a matter of fact, the Philippine Constitution institutionalized this "fear" and calls it by another name: accountability of public officers.

7. *Article VII Section 15—Conclusions*

The Constitution, like any other law, should be construed as a *whole*.[167] Provisions should not be studied as detached and isolated expressions but must dovetail and conjoin to produce a harmonious whole. Verily, constitutional norms and values must not be "an agglomeration of unrelated clauses" that jostle and interjam in their operation. As in statutes, courts will adopt that which will render it operative.[168] Further, it is the rule in statutory construction to avoid any conflict in the provisions of the statute by endeavoring to harmonize and reconcile every part thereof so that each shall be effective.[169] It is probable that statutory, even constitutional, provisions may present such an inconsistency that cannot be harmonized or reconcile. It is evident that in such a case effect cannot be given to all the provisions of the statute; but always a construction should be sought which would give effect to the intention of the legislature[170] or constituent body.

Article VII section 15 should be construed therefore in relation with other constitutional provisions. Thus, while the President is immune from suit *during* his tenure, it does not make him untouchable in the light of Article XIII section 2 which provides that he may be removed from office on impeachment for constitutional violations, treason, bribery, other high

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164 *The Supreme Court, supra* note 117, at 235.
165 438 U.S. 478, 506 (1978).
166 Becht, *supra* note 103, at 1127, 1168.
167 Alcantara, *supra* note 38, at 81.
168 *Id.* at 83.
169 *Id.* at 84.
170 *Id.* at 85.

crimes and graft and corruption. It seems that a President serving his term could not be held liable except by way of the impeachment mechanism. But this is not all. The *Nixon* case mentioned other alternatives that may check presidential indiscretion: his desire for re-election, his concern for his niché in history, and the scrutiny of both the press and Congress. Save for the impeachment process, therefore, the first sentence of Article VII section 15 completely obliterates a direct public intrusion into the workings of the executive branch which is the nightmare depicted in *Chuoco Tiaco*. But again, *Chuoco Tiaco* could hardly be a justification for a post-tenure immunity. Here is where the "policy judgment" argument comes into play—that the 1981 ratification had in effect breathed life onto the unpopular second sentence of Article VII section 15. Comparisons with other constitutions showed by how much we have skewed from the "normal curve" observed by other constitutional regimes. Nor is the second sentence all that palatable in the light of other norms enshrined in the Constitution, especially Article XIII section 4 which renders an *impeached* official after removal from office subject to prosecution, trial and punishment in accordance with *law*. In effect, the second sentence seemed to have pre-empted what the Batasang Pambansa may enact as law specifying the conduct of trial and prosecution apropos the impeached official. With tenure and post-tenure immunity, the President had been gifted with a lifetime immunity from civil and criminal suits—but only with respect to official acts done by him. This means that only with regard to acts during his official tenure is the President immune. When he steps down from his office, he joins the rest as an ordinary citizen with common vincibility to the judicial process. This is clear from the constitutional provision. As a corollary, the subordinate is immune only to the extent that he performed official acts pursuant to the orders of the President during the latter's tenure. The crux of the matter therefore is the import of the term "official acts." Clearly, it contemplates those acts performed while in the government service, or during incumbency, or during the period the subordinate had the trust and confidence of the principal. The point is official acts are not necessarily legal acts. They may be ultra vires and are susciptible to injure others. On the other hand, official acts are not necessarily illegal either, but though performed under the authority of law, injury may still be inflicted on others. In both these cases where officials acts entail damage to third parties, it is only that all-important element of discretion which could shield the official from liability. The determination of whether the official used discretion or not should not be utterly simplified by the grant of absolute immunity or derivative absolute immunity because this privilege does away with trial on the merits. The official should be made more vigilant of the consequences of his official acts by the grant of qualified immunity. Here the plaintiff's cause of action may be wittled down as frivolous during the pre-trial stage and the official can consequently move for summary judgment. He need not go through the trial and no loss of integrity is involved.

But if the aggrieved party had shown the utter lack of discretion of the official at pre-trial, then the erring official must vindicate himself by undergoing the ordeal of a full-blown trial on the merits. Only then can we strike a balance between the need of the official to be unhampered in the execution of government functions and the right of the citizen under the Constitution to obtain redress for government wrongs.

We have shown in a previous discussion that even since Blackstone's England, the king was shielded by his ministers to perpetuate the fiction that he can do no wrong. Some constitutions today still preserve this concept through a variant authorizing ministers to legalize or authenticate the acts of the President thereby absolving the President through their imprimaturs. The flow of causality is curiously reversed in our system, thus necessitating a *derivative* categorization of that immunity contained in the second sentence: the "others" mentioned in the provision, which presumably include the President's ministers, do not shield the President by their acts, but rather it is the *office* of the President, not their *functions,* which shields these "others" from suit. We have shown that this officewide post-tenure immunity of the President's subordinates is untenable, because being derivative in nature it cannot survive past the President's tenure which is precisely its *raison d'etre.* Moreover, the absolute derivative immunity granted package-deal without benefit of further legislative clarification glosses over the essential elements of this types of immunity which must properly be raised as issues of fact in a judicial proceeding, if essential due process is to be given to the aggrieved party. The "absoluteness" of this immunity, therefore, cuts a rather wide swath into the judicial domain, preventing an exhaustive examination of the complaint which the public official need not answer on the merits since he only has to show the questioned act was well within the official reserve. The functional approach to immunity is likewise eroded by this grant of officewide immunity, because by not specifying the nature of the President's orders that would render the others immune, in their subsequent performance of official acts it may be inferred that *whatever* acts in the performance of *whatever* functions are allowed; thus, there is expanded the contours of the traditional pockets of immunity in American jurisprudence (legislative, judicial and prosecutorial functions) and the recently suggested areas in *Nixon* (national security and foreign policy).

This paper finds the immunity for the President *during* his tenure as the best compromise that must be upheld with the wisdom, foresight and eloquence of *Chuoco Tiaco.* However, the post-tenure immunity for the President has no leg to stand on, and the "vindictiveness" argument often raised in support of it speaks poorly of the political maturity of the Filipino people and shows as well the glaringly defensive posture being sought *for* the highest public office in the land. Granting *arguendo,* that the President may be tolerated this immunity after his tenure, its extension

to "others" takes a whole lot of probably undeserving officials under the President's protection. It is at this point where the principle of accountability must barge in and be upheld so that redress of grievances, as a protected constitutional right, be given substance and flesh in the daily living of the Constitution. This argument is not only morally convincing; it finds support in a host of other constitutional provisions adverted to in an earlier section. The absence of this ill-founded immunity should never strike the "gossamer webbed" fear in the hearts of public officials, but rather it should inspire vigilance and watchfulness in the execution of their official duties—a vigilance which should be there, with or without immunity. Not to rely on this blanket immunity and to brave the exposure to suits is trust enough in the judicial process in ferreting out the truth and vindicating the rights of the oppressed—be he citizen or the official himself. Sealing off this valve for the aggrieved only adds fuel to the vindictiveness which may have been originally negligible. The solution which this paper affords as a favorable balance between the competing interests of public redress and government efficiency is clear: a post-tenure qualified immunity both for the President and his subordinates.

Finally, while we may have to bear with this constitutional incongruity for some more years to come, the experience of the people, the necessities of the times, and the institutions of public policy may eventually win out and drive this ugly duckling out of the constitutional picture—Filipinos and constitutions being equally perfectible, with time. And having come a full circle, we come back to Professor Engdahl with his graceful line and silent truth:

> There are elements of our constitutional heritage whose loss could not be viewed with equanimity however appropriate to contemporary convenience their disregard might be. They very notion of written constitutions was conceived as a means of preventing the rule of convenience from legitimating much that "the felt necessities of the time" might invoke.[171]

[171] Engdahl, *supra* note 2, at 1.